NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE
Friday, December 8, 1995

(R-2121)
202/273-1991

JOHN J. TONER NAMED NLRB EXECUTIVE SECRETARY

John J. Toner, a career employee with the National Labor Relations Board, has been selected as the Executive Secretary of the Board.

Mr. Toner has been in the position on an acting basis since June 4, 1995. He succeeds John C. Truesdale, who has served as a Board Member since December 23, 1994 on a recess appointment by President Clinton.

The NLRB administers and enforces the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees desire union representation, and it investigates and remedies unfair labor practices. The Office of the Executive Secretary is the conduit for all unfair labor practice and representation cases which reach the five-Member Board in Washington, D.C. It is responsible for administering and monitoring the processing of cases through the Board to final decision.

In announcing the appointment, Chairman William B. Gould stated:

"Jack Toner is a dedicated civil servant. He brings to the position a broad range of experience in the agency's operations at headquarters and in the field structure. As a manager, he has a 'can-do' attitude, good ideas, and possesses a lot of common sense. I wish to commend

Jack for the excellent job he did serving on an acting capacity as Deputy Executive Secretary and then as Executive Secretary."

A native of Pittsburgh, Mr. Toner joined the NLRB in 1970 as a Field Examiner in the Pittsburgh office. In 1973, he transferred to the Internal Revenue Service in Philadelphia, where he was a labor relations specialist. In 1976, Mr. Toner moved to the Social Security Bureau of Hearings and Appeals in Washington, D.C., where he was Chief of Labor Relations. In 1978, he returned to the NLRB as Chief of the Labor Management Employees Relations Section in the Personnel Branch. In 1981, he was promoted to Associate Executive Secretary.

Mr. Toner received a B.A. degree in labor-management relations in 1970 from Penn State University. He earned a J.D. degree in 1985 from George Mason University School of Law. Mr. Toner and his wife Linda have three sons: John, 18, Patrick, 15, and Joseph, 9. The family resides in Arlington, Virginia.

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NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE **(R-2120)**
Wednesday, November 29, 1995

NLRB HALTS ELECTIONS, TRIALS, INVESTIGATIONS DURING GOVERNMENT SHUTDOWN

More than eleven thousand (11,000) employees of 109 employers, who had expected to vote in representation elections conducted by the National Labor Relations Board (NLRB) during the week of November 13, were forced to wait for up to 5 weeks, when the NLRB halted operations as part of the government-wide shutdown that week, according to a survey of Agency operations interrupted by the funding hiatus.

Upon resuming operations along with the other government agencies that had suspended or sharply curtailed activities the week of November 13, NLRB officials took stock of the impact of the shutdown. Among their findings:

- 109 representation elections had to be postponed or cancelled. Over 11,000 employees were eligible to vote in these elections. Postponements to date have ranged from 4 to 35 days, with some still to be rescheduled. One election involved more than 2,500 employees; one involved more than 1,500, and two involved close to 1,000.

- An additional 95 preëlection hearings in representation cases were postponed between 5 and 21 days, or cancelled, affecting approximately 5,000 employees.

- Trials of alleged unfair labor practices (ULPs) were postponed in 37 cases, affecting approximately 1,700 employees. Postponements ranged from 6 to 220 days, depending on availability of attorneys and judges. Such postponements may delay the return to work of unlawfully discharged employees and increase the amount of backpay for which employers are liable, or may otherwise jeopardize the prompt resolution of bargaining disputes.

- Investigations were delayed in 4,500 ULP cases and 350 representation cases.

- Court litigation was impeded in several dozen cases. Extensions of time had to be sought, inconveniencing the courts and opposing attorneys. In at least one case, settlement efforts had to be aborted. Court appearances must be rescheduled, further delaying ultimate resolution of disputes.

- Further strains were placed upon the Agency's already-tight budget. Some payments to suppliers were delayed; interest or penalties are now due. Discounts for early payment were forfeited. Development of an Agency-wide case tracking computer system, by a contractor, was delayed. A training session in a field office had to be cancelled, at a cost of $2,800.

- The Agency's fixed costs during the period included $1,747,000 in pay for the 4 furlough days—almost 1 percent of the Agency's total budget for preceding fiscal year—and over $250,000 in rental of space and equipment.

Employers and Unions alike protested the cancellations or postponements of elections and hearings. The absence of appropriations necessary to fund most federal government activities caused the NLRB to close all of its offices, including 52 field offices and Washington headquarters. A skeleton crew of less than 1 percent of Agency staff remained on duty to monitor any potential emergencies involving an imminent threat to life of property. The skeleton crew included one person reporting to each of 8 regional offices, to coordinate the Agency's response to any possible emergencies arising in the same geographic region of the country.

The Agency is continuing to assess the impact of the shutdown on its ability to promptly resolve labor disputes and thereby promote mutually beneficial labor-management relations.

For more information please contact Joseph Frankl, Office of the General Counsel 202/273-3700.

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NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

(SELECT DISTRIBUTION)

FOR IMMEDIATE RELEASE
Tuesday, November 7, 1995

(R-2119)
202/273-1991

IAM-BATH IRON WORKS SEMINAR CANCELLED

The IAM-Bath Iron Works Seminar scheduled for November 9, 1995 at the National Labor Relations Board has been cancelled due to a last-minute, unavoidable conflict in the schedule of one of the principal participants. We appreciate your interest in attending the program and hope the cancellation does not inconvenience you. We hope to re-schedule the program at a later date and will let you know when we are able to do so.

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NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE
Friday, November 3, 1995
11:00 a.m.

R-2118
202/273-1991

THE STATE UNIVERSITY OF NEW JERSEY
RUTGERS
SCHOOL OF MANAGEMENT AND LABOR RELATIONS
FALL STATE ADVISORY COUNCIL MEETING

"THE WORK OF THE LABOR BOARD AND THE STATE OF THE EMPLOYMENT RELATIONSHIP IN AMERICA"

Delivered by:

William B. Gould IV
Chairman
National Labor Relations Board
Charles A. Beardsley Professor of Law
Stanford Law School (On Leave)

November 3, 1995
Rutgers University
Janice H. Levin Building
New Brunswick, NJ

Thank you Dean John Burton! Good morning, State Advisory Council and Trustees Advisory Council members, faculty and students.

I am pleased to have the opportunity to be here today at Rutgers School of Management and Labor Relations which, through its research and scholarship, has contributed so much for many years to constructive labor management relations in this country. Two years ago I was delighted to be asked by Dean Burton to serve on your Advisory Council -- and I promptly accepted his invitation. Also, coming here evokes memories of my childhood in Long Branch where I attended public schools from K through 12. The beauty of the Atlantic Ocean and the Jersey Shore is taken for granted by the young. Now, at a more "mature" age than I was in Long Branch, I realize that it was and is a very special place indeed!

Moreover, I owe a personal debt of gratitude to New Jersey because of the support for my confirmation in the Senate 20 months ago by Senators Bill Bradley and Frank Lautenberg and for their support, along with that of New Jersey 6th District Congressman Frank Pallone (a fellow graduate of Long Branch High School who represents my mother's Congressional district), in the current battle in the Congress over our agency's budget. I would be remiss also if I failed to mention the very important non-partisan support the NLRB received from the New Jersey Bar Association, which wrote to Congress on behalf of both the employer and union members of the Labor Law Section in support of the budget proposed by President Clinton for our agency. This kind of support from employers and unions together is the strongest kind of recommendation possible that the agency is doing its job effectively and impartially in the public interest. It also is evidence that the job the agency is doing is critical both to employers as well as to unions and to the public's interest in orderly and peaceful labor-management relations.

This sixtieth anniversary year of the Wagner Act is a time of crisis and change in the government of our nation, in the labor movement, in labor-management relations and in the National Labor Relations Board. New Deal, New Frontier and Great Society programs are under siege in the 104th Congress. Our agency has been criticized since its inception by employers and unions as well, but the attack this year is the most severe since the thirties.

As you may know, the House of Representatives voted last July to cut the NLRB's budget by 30 percent along with similar cuts in OSHA, EPA, FDA, SEC, Head Start, school lunches, and a host of other programs. Where we will end up on our budget is anybody's guess. The Senate committee responsible for the NLRB's budget voted to keep us at the same level for 1996 as in 1995.

President Clinton had proposed a small increase which would permit us to complete the updating of our computer system and add 62 employees needed in our field offices to avoid the buildup of a case backlog. (Employment in our small agency is now at 2054, its lowest level in recent history, despite a steady level of case

intake. Agency employment is down 30 percent from its peak of 2951 in 1979. Since 1984, case intake per employee has increased by 29 percent, a substantial increase in productivity.)

The right to organize and bargain collectively is a critical underpinning of our democratic society in which labor and capital co-exist and cooperate. Free collective bargaining is more vulnerable now than at any time since the Wagner Act was passed. And we should be clear about what is at stake. A vacuum in collective representation vacated by unions imperils democracy in the workplace -- and in society generally -- and it is overburdening the courts with the litigation of issues that can be resolved more quickly, effectively and economically in the workplace through collective bargaining procedures.

Against this threatening backdrop, our primary effort at the Board for the past 20 months has not been to reverse precedents from previous Boards (though we have and shall do so where it is appropriate) -- as the Reagan Board did a decade ago -- but rather to reduce the Board's backlog of cases, eliminate delays in procedures, reduce the need for litigation and encourage the use of informal dispute resolution procedures.

Innovations I have advanced include: (1) an improved postal ballot procedure for representation elections in situations where employee voters are scattered or where the part-time or temporary status of workers makes their presence at an on-site election uncertain or improbable, or where the location of an election is distant from the nearest NLRB field office; (2) a trial project involving Administrative Law Judge procedures including the use of settlement judges and bench decisions in appropriate cases; (3) a new procedure for expediting Board decisions; (4) the proposed adoption of a single unit rule for representation elections which is designed to enable the parties to avoid needless relitigation of old issues; and (5) a commitment to use our authority to obtain temporary injunctions against both unions and employers under Section 10(j) of the Act where the appropriate standards are met.

As you know, the most celebrated instance of resort to our Section 10(j) authority was in baseball last spring. Our injunction obtained last April -- affirmed emphatically by the Court of Appeals for the Second Circuit just a few weeks ago[1] -- allowed the season to proceed and be played. The extraordinary Atlanta-Cleveland World Series, played by the two best teams in baseball, was a fitting culmination to a glorious season. I am proud that the NLRB established the procedural framework for collective bargaining in baseball -- (as well as basketball just a couple months ago) -- and that it did so through the rule of law which is so vital to a civilized

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[1] Silverman v. Major League Baseball, ___ F.3d ___, 150 LRRM (BNA) 2390 (2nd Cir. September 29, 1995).

society. Now the players and owners must get on with it and resolve their differences off the field with the same verve and aplomb demonstrated on the field!

New Administrative Law Judge Procedures

On February 1 of this year we established a one year trial period for revised Administrative Law Judge procedures which both created "settlement judges" and permitted bench decisions by Administrative Law Judges. The objectives of these new procedures is to resolve disputes quickly, informally, and early in the proceeding, thus avoiding long and costly litigation, hearings and appeals.

Experience to date with settlement judges has been encouraging. Every case that is resolved short of a formal ALJ hearing represents a significant savings to all concerned -- to the taxpayers and the parties. Since the procedure began on February 1, 1995, settlement judges have been assigned in 55 cases, and there have been 35 settlements. Settlement judges have been recommended in a number of other cases, but not all the parties have agreed. Since February 1, there have been 10 bench decisions issued by 9 different judges. When one considers the fact that the average hearing produces a 500-page transcript, the savings that can be achieved by the successful effort of a settlement judge is clear. Preliminary indications are that the number of bench decisions has been low because long hearings typically do not lend themselves to bench decisions and because pre-hearing settlements are being reached in a high percentage of the cases that would be suitable for a bench decision. The performance of our ALJs for fiscal 1995 improved substantially over the previous year and on every measure represented a new high for the past six years.

The NLRB for many years has had the reputation of being one of the most effectively administered government agencies, yet we know that our decision-making processes have been too slow and can be improved. So, we have been working hard at speeding up our case processing and reducing our case backlogs. We are making headway on both fronts.

Speed Team Procedure

As a part of this effort, in December 1994, the Board adopted a new "Speed Team" case handling procedure. The speed team procedure eliminates preparation of duplicative and unnecessary documents in cases which are essentially factual where credibility determinations already have been made either by an Administrative Law Judge in an unfair labor practice hearing or Hearing Officer in a dispute arising out of a representation proceeding. The key to the effectiveness of the speed team procedure is direct and active involvement of the participating Board member.

The speed team procedure has been used in 231 cases since it was adopted last year. The median number of days for issuance of all unfair labor practice cases from assignment during this period was 100 days compared to 59 days for speed team cases. The comparable figures for representation cases are 80 days and 40 days, a 50 percent reduction in the time required to issue a decision. This contrasts favorably with the median for processing unfair labor practices by the Board of 181 days in 1985 and its peak of 207 days in 1989.

Our current case inventory is 366 cases compared to a backlog of 1196 in 1985 on the 50th anniversary of the NLRB and 476 on the 25th in 1960. The number of cases awaiting decision by the Board -- a problem which has concerned my predecessors ever since the terms of Chairman Frank McCulloch in the sixties -- is the lowest since 1974, except for 1991 and 1992.

Single Unit Rule

Consistent with our goal of reducing litigation and speeding up NLRB processes, the Board has used its rulemaking power to propose a new single unit rule. As proposed, the rule establishes an alternative to case-by-case adjudication in most single location cases by setting forth the decisive factors to be used in determining the appropriateness of a single location bargaining unit where the employer has more than one facility. The proposed rule, published in the September 28, 1995 Federal Register, would apply to all routine Board cases in which the issue is whether a unit of unrepresented employees at a single location is an appropriate unit. The Board will continue to decide novel and unusual cases by adjudication under the extraordinary circumstances exception to the rule.

In brief, the proposed rule provides that "an unrepresented single location unit shall, except in extraordinary circumstances, be found appropriate for the purposes of collective bargaining provided: (1) That 15 or more employees in the requested unit are employed at that location; (2) That no other location of the employer is located within one mile of the requested location; and (3) That a supervisor . . . is present at the requested location for a regular and substantial period."

My intent for this proposal is to set forth more clearly for the public and labor bar the factors the Board will find critical in most single location cases. The result will be that parties will not have to engage in drawn out and wasteful litigation to determine whether a unit is appropriate. In my view, having a single location unit rule also will enable the Board to process these cases more efficiently -- faster and at less expense to the agency and the parties as has been the case with the health care rules adopted by the Board in 1989 and approved by the Supreme Court in 1991.

Employee Involvement in the Workplace -- Electromation

Employee involvement or participation in the workplace has been a hotly debated labor law topic ever since the Board's 1992 Electromation decision. Electromation coincided with the 1980s wave of increasing adoption of various employee involvement mechanisms in the workplace in response to competition from Japan[2] and elsewhere in the global marketplace.

With the debate about the TEAM Act proceeding in the Congress, the Board in Keeler Brass Automotive Group,[3] issued a decision that gave me an opportunity to articulate my views in a concurring opinion about the kinds of employee involvement activities that can be undertaken under existing law. I joined my colleagues in Keeler Brass in concluding that the company had violated Section 8(a)(2) by setting up a grievance committee whose structure and function was dominated by management. We determined the committee was in fact a "labor organization" as defined by Section 2(5) of the Act and accordingly ordered it disbanded.

In my concurring opinion, I said: "The freedom of choice and independence of action open to employees on the committee is too strictly confined within parameters of the employer's making for the committee to be a genuine expression of democracy in the workplace." I also pointed out that where decision-making authority is delegated to employee committees, councils or entities, they are not "labor organizations" created by management in violation of the Act even though the group was proposed by the employer.

And I stressed my agreement with the Court of Appeals for the Seventh Circuit[4] and stated that the fact that the employer proposes or takes the initiatives in creating an employee committee does not necessarily constitute unlawful assistance. On this point, a number of considerations are important: (l) how did the group come into existence?; (2) why did it come into existence?; and (3) the independence and composition of the group. Several more cases await decision by the Board which may provide further opportunities for clarifying 8(a)(2) without opening the door for company unions.

Strikes and the Law

In recent years there has been considerable debate about another controversial labor relations issue: the growing use of permanent striker

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2 My thinking on some of these initiatives is reflected in William B. Gould IV, *Japan's Reshaping of American Labor Law*, (MIT Press) 1984.

3 317 NLRB No. 161 (July 14, l995).

4 Chicago Rawhide Mfg. v. NLRB, 221 F.2d 165 (7th Cir. 1995).

replacements. President Clinton has issued an Executive Order[5] which limits the use of this tactic. Employers and unions strongly make their cases on opposite sides of the issue, but the case for the public's interest in protecting strikers' rights is not often articulated clearly. The extent of protection under the National Labor Relations Act for wildcat or unauthorized strikers is a related but less controversial issue.

Unions have responded to the impairment of their ability to wage a strike with so-called corporate campaigns and disruptive actions on the job and in the streets. Such alternatives to the strike -- the subject of great debate in the labor movement -- have brought forth employer complaints that such tactics are abusive and unnecessarily confrontational. Whatever one thinks about the appropriateness of particular tactics, the ability to bargain constructively for the employees whom they represent is essential to the very existence of trade unions and to our system of free collective bargaining.

The status of wildcat or unauthorized strikes under the National Labor Relations Act was the subject of a recent Board decision in Durham Transportation Inc.[6] Although the Board found that the work stoppage by some employees was unprotected, the six dismissed employees had not participated in the stoppage and were therefore reinstated. In my concurrence I indicated my belief that previous Board doctrine has taken an "excessively protective approach to unauthorized work stoppages . . . and, in the appropriate case, would consider expressly overruling Board precedent applying that doctrine." Here the public interest in orderly and stable collective bargaining processes clearly supersedes the individual's interest in protection for concerted activities not sanctioned by the union.[7]

Reform of Board Appointment Terms and Procedures

It is inevitable that views about politics, economics and society can affect one's views about labor policy and interpretations of the statute. As a general proposition involving judges and the law, this point was made eloquently by Justice Benjamin Cardozo more than seven decades ago.[8]

But my view is that Congress could make changes which would reduce the impact of politics on the Board, and -- as a registered Democrat (here in New Jersey before I went to California) who loves the political process and its potential for

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5 Executive Order 12954, 60 Fed. Reg. 13023 (March 8, 1995).

6 317 NLRB No. 106 (May 31, 1995).

7 My views on this subject are set forth in William B. Gould IV, *The Status of Unauthorized and 'Wildcat' Strikes Under the National Labor Relations Act*, 52 Cornell Law Quarterly 672 (1967).

8 Benjamin N. Cardozo, *The Nature of the Judicial Process*, Yale University Press, 1921.

improving the lives and conditions of the ordinary person -- I mean "politics" in the bad sense of the word. Frequently, in the past, the Board's decision-making process has been disrupted by prolonged vacancies on the five-member Board and by excessive turnover due to the high degree of politicization in the appointment and confirmation process. As I have previously stated, I am of the view that a constructive change in the Act would be to move away from five-year terms with the current possibility of reappointment, to a single seven or ten year term -- as in the Board of Governors of the Federal Reserve, though their terms are longer -- but with no possibility of reappointment. In this way, we would get the very best people to serve for the very best reasons.

It is important for the statute to be interpreted by dispassionate and principled individuals whose only thought, like that of the Roman general, Cincinnatus, so many centuries ago, is to return to their homes and their farms after their terms have expired and to continue their work in some other capacity.

Also, consideration should be given to allowing incumbent Board members to continue to serve until the confirmation by the Senate of their successor. This would eliminate problems experienced as a result of prolonged vacancies when the President and the Senate cannot agree on a new appointee. With the departure of Board Member James Stephens in August, the Board membership is currently four. We will be down to three in December when John Truesdale's recess appointment expires with the adjournment of Congress.

The Board is in the midst of a challenging and sometimes perilous journey. I think that we have discharged our responsibilities fairly and impartially. And, most important, we have adhered to the statute's philosophy adopted by Congress when it wrote the National Labor Relations Act!

It is a pleasure to return here to the Rutgers campus to discuss the work of the National Labor Relations Board. My first visit here in New Brunswick was the Rutgers-Temple football game with my parents in 1948. So my contact with New Brunswick goes back close to the time that I first moved from Massachusetts to New Jersey.

In a short while, I depart from this lovely campus to drive to the other side of the state on the Shore where by mother now lives in Elberon. Containing as it does practically all of my childhood memories, the lovely Garden State -- that most who travel through never truly see -- is a good place for me to revisit. I look forward to contact with you here at Rutgers in the coming years and your sage advice about the way in which we can make ourselves more effective as a quasi-judicial agency entrusted with the rule of law.

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